



Federal Communications Commission
Washington, D.C. 20554

October 25, 2007

DA 07-4380

In Reply Refer to:

1800B3-JP

Released: October 25, 2007

KM Communications, Inc.
3654 West Jarvis Avenue
Skokie, IL 60076

Re: **AM Broadcast Auction 32**

Ewa Beach, Hawaii
Facility ID No. 129546
File No. BNP-20001023ACY

**Application for New AM Station
Construction Permit**

Dear Applicant:

We have before us: (1) the above referenced application filed by KM Communications, Inc. ("KM") for a construction permit for a new AM station at Ewa Beach, Hawaii; (2) an informal objection filed by Jeff Alexander, the Chairman of the Ewa Neighborhood Board ("Alexander") on September 27, 2001; and (3) the response of KM to the informal objection filed on November 13, 2001. For the reasons set forth below we deny the informal objection and grant the application.

Background. On February 1, 2000, KM filed a "short form" FCC Form 175 application for a new AM station in Ewa Beach, Hawaii, during the filing window for AM Auction No. 32.¹ Based on the information contained in KM's short form application, the staff determined that KM's application was not mutually exclusive with any other application and directed KM to file a "long form" FCC Form 301.² KM timely filed the long form application on October 23, 2000.³

On September 21, 2001, Alexander filed an informal objection to KM's long form application stating that KM's application for a construction permit should not be granted because: (1) the Ewa

¹ File No. BNP-20000201AFB.

² See *AM Auction No. 32 Non-Mutually Exclusive Applications*, Public Notice, 15 FCC Rcd 18004 (MMB Sept. 22, 2000).

³ Minor amendments to KM's long form application were accepted on December 1, 2000, March 21, 2001, and November 9, 2004.

Neighborhood Board voted to “not approve construction of the radio tower” proposed in KM’s long form; and (2) the Ewa Neighborhood Board feels that KM “should do an environmental impact statement.”

In response, KM points out that the Ewa Neighborhood Board is merely an advisory board, and that the City and County of Honolulu Department of Planning and Permitting is the authority “responsible for . . . land use approvals, zoning and land use permits, [and] construction and building permits.”⁴ KM further states that local zoning approval is not required at the application stage and that any concerns the Ewa Neighborhood Board have will be addressed “at the appropriate time during the local zoning and land use permit approval process before the City and County of Honolulu Department of Planning and Permitting.”⁵ KM also states that it is willing to consider alternate sites for the proposed towers “to satisfy local zoning and/or community concerns” but that such consideration is premature at this stage in the application process.⁶ KM also states that its application is “categorically excluded from environmental processing and the requirement to conduct an environmental assessment”⁷

Additionally, KM’s long form application contains a request for waiver of Section 73.24(g) of the Commission’s Rules (the “Rules”)⁸ because the population within the proposed 1V/m blanketing contour is three percent of the population within in the proposed 25 mV/m contour, contrary to the limitation of one percent or less required by Section 73.24(g) of the Rules.

Discussion. *Informal Objection.* An applicant seeking a new broadcast facility must possess “reasonable assurance” of the availability of its proposed transmitter site at the time it files its application.⁹ While some latitude is afforded such “reasonable assurance,” there must be, at a minimum, a “meeting of the minds resulting in some firm understanding as to the site’s availability.”¹⁰ A mere possibility that the site will be available is not sufficient.¹¹ Although the Commission repealed the requirement that broadcast applicants certify the availability of the transmitter site when it adopted its

⁴ Response at 2.

⁵ Response at 3.

⁶ Response at 3-4.

⁷ Response at 3.

⁸ 47 C.F.R. § 73.24(g).

⁹ See, e.g., *Port Huron Family Radio, Inc.*, Decision, 66 RR 2d 545 (1989); *Radio Delaware, Inc.*, Memorandum Opinion and Order, 67 RR 2d 358 (1989). See also *William F. Wallace and Anne K. Wallace*, Memorandum Opinion and Order, 49 FCC 2d 1424, 1427 (1974) (“Wallace”); *South Florida Broadcasting Co.*, Memorandum Opinion and Order, 99 FCC 2d 840, 842 (1984) (specification of site is an implied representation that site is available).

¹⁰ *Genesee Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 3595 (1988). The applicant need not own the proposed site and may even work out the final details for a lease sometime in the future. The “reasonable assurance” standard is satisfied by “[s]ome clear indication from the landowner that he is amenable to entering into a future arrangement with the applicant for use of the property as its transmitter site, on terms to be negotiated. . . .” *Elijah Broadcasting Corp.*, Memorandum Opinion and Order, 5 FCC Rcd 5350, 5351 (1990).

¹¹ See *Wallace*, 49 FCC 2d at 1425.

competitive bidding procedures,¹² the Commission's basic "reasonable assurance" standard remains unaltered.¹³ The instructions to FCC Form 301 underscore this requirement.

As a general matter, the Commission does not involve itself in zoning matters. It assumes that applicants will be able to obtain local zoning and land use permits, unless it has been shown that zoning approval had already been, or likely would be, denied by the local land use authorities.¹⁴ Here, Alexander has not supplied information sufficient to overcome the presumption that local zoning approval will be granted by the proper authority. The Ewa Neighborhood Board's opposition to the construction of the proposed facility is insufficient to put in issue the availability of the KM site.¹⁵

KM certifies in its long form application that its proposed facility is excluded from the environmental processing rules.¹⁶ Alexander's unsupported conclusion that KM "should do an environmental impact statement" does not raise a substantial and material question of fact calling for further inquiry into KM's certification, thus his informal objection will be denied.¹⁷

Waiver Request. Section 73.24(g) of the Rules requires that the population within the proposed 1 V/m contour not exceed one percent of the population within the 25 mV/m contour. KM states that a waiver of Section 73.24(g) of the Rules is appropriate because of the "generally rural characteristics immediately surrounding the propose site."¹⁸ KM states that should a waiver be granted, it takes full responsibility to remedy reasonable complaints of blanketing interference under Section 73.88 of the Rules.¹⁹ Under these circumstances we find it in the public interest, and consistent with Commission policy and precedent, to grant a waiver of Section 73.24(g) of the Rules.²⁰

Conclusion/Actions. We have evaluated KM's long form application, and find it fully compliant with all pertinent statutory and regulatory requirements. We also find that grant of the application would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that, for the reasons set forth above, the September 21, 2001, Informal Objection filed by Jeff Alexander IS DENIED.

¹² See *Implementation of Section 309(j) of the Communications Act*, First Report and Order, 13 FCC Rcd 15920 (1998) ("Auction Order").

¹³ See *Liberty Productions, A Limited Partnership*, Memorandum Opinion and Order, 16 FCC Rcd 12061, 12084-85 (2001).

¹⁴ *Artichoke Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC Rcd 12631, 12633 (1995).

¹⁵ See *Lebanon Valley Radio*, Decision, 5 RR 2d 65, 67 (Rev.Bd. 1965) (a site availability issue was not warranted on the basis of affidavit of the residential association's president, who stated that his association would vigorously oppose a zoning request).

¹⁶ Application, Section III-A, Question 11. See 47 C.F.R. § 1.1306 (a proposed facility is exempt from environmental processing if it will not have a significant environmental impact and complies with the maximum permissible radiofrequency electromagnetic exposure limits for controlled and uncontrolled environments).

¹⁷ See *Area Christian Television, Inc.*, 60 R.R. 2d 862 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

¹⁸ Exhibit E, Engineering Report at 8.

¹⁹ 47 C.F.R. § 73.88.

²⁰ See *Mariner Communications, Inc.*, Memorandum Opinion and Order, 79 FCC2d 504, 505 (1980).

IT IS FURTHER ORDERED, that KM Communications, Inc.'s request for waiver of Section 73.24(g) of the Rules is GRANTED.

IT IS FURTHER ORDERED, that the application (File No. BNP-20001023ACY) of KM Communications, Inc. for a new AM station at Ewa Beach, Hawaii, IS GRANTED. The authorization is enclosed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Jeff Alexander
Jeffrey L. Timmons, Esq.